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1       **I. PRELIMINARY STATEMENT.**

2       Plaintiff's First Amended Complaint ("FAC") contains the same deficient allegations as  
 3 his original Complaint and should be dismissed. In both complaints, plaintiff seeks a class action  
 4 to hold Twilio, Inc. ("Twilio") liable for allegedly sending unsolicited text messages in violation  
 5 of the Telephone Consumer Protection Act ("TCPA"), alleging only that Twilio provided a service  
 6 through which its customer sent text messages. Having failed to correct the deficiencies of its  
 7 original Complaint—and being unable to do so—the FAC should be dismissed with prejudice.

8       Plaintiff has not and cannot allege a TCPA violation against Twilio. In contrast to the  
 9 telemarketers and spammers targeted by the TCPA, Twilio merely provides its customers a  
 10 software platform that allows them to send short message service ("SMS") calls to telephone  
 11 numbers specifically identified and provided by Twilio's customers. In this intermediary role,  
 12 Twilio functions like common carriers and fax broadcasters who are exempt from liability under  
 13 the TCPA. As a general service provider, Twilio may not be liable under the TCPA absent factual  
 14 allegations that Twilio (1) was heavily involved in controlling the content or recipients of the text  
 15 messages or (2) actually knew that its service was being used in violation of the TCPA. As was  
 16 the case with the original Complaint, the FAC contains no such factual allegations, nor could  
 17 plaintiff make a genuine allegation that Twilio played such a role. For those reasons, the FAC  
 18 against Twilio should be dismissed with prejudice.

19       If the Court were to consider maintaining an action against Twilio, the Court should  
 20 instead refer this matter to the Federal Communications Commission ("FCC") under the doctrine  
 21 of primary jurisdiction. Congress mandated the FCC to implement rules and regulations  
 22 governing the TCPA; and the FCC is currently considering a petition in which a Twilio competitor  
 23 requested a declaration to exempt companies like Twilio from liability under the TCPA. Because  
 24 the precise issue presented in this case is pending before the FCC, and the FCC would be best-  
 25 positioned to establish uniform TCPA guidelines, the Court should refer this matter to the FCC if  
 26 the matter is not dismissed.

27       **II. SUMMARY OF RELEVANT FACTUAL ALLEGATIONS.**

28       In the first amended putative class action complaint, plaintiff Brian Glauser alleges that

1 Twilio and GroupMe, Inc. (“GroupMe”) violated the TCPA, codified at 47 U.S.C. § 227. Plaintiff  
 2 alleges that, in April 2011, he received text messages from a phone number “owned and/or  
 3 operated” by Twilio and used by GroupMe. FAC ¶ 32. Plaintiff alleges receiving multiple text  
 4 messages inviting him to be part of a “GroupMe group.” FAC ¶¶ 40, 41.

5 Plaintiff alleges that GroupMe offers a service through which an individual or entity can  
 6 create a “group” and send text messages to multiple individuals at once. FAC ¶ 10. To provide  
 7 this service, GroupMe acquired a telephone number from Twilio, and through that telephone  
 8 number, GroupMe sent text messages to plaintiff. FAC ¶ 11. Just as in the original Complaint, in  
 9 the FAC, plaintiff does not allege that Twilio (1) controlled any of the content of the text  
 10 messages; (2) controlled who should receive any of the text messages; or (3) knew that the text  
 11 messages sent to plaintiff were unlawful.

### 12 **III. PLAINTIFF FAILS TO STATE A CLAIM AGAINST TWILIO.**

#### 13 **A. The Complaint Must Meet Rule 8 Pleading Standards.**

14 To survive a motion to dismiss, a complaint must state a “plausible” claim for relief.  
 15 *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949-50 (2009). Plausibility requires “more than a sheer  
 16 possibility that a defendant has acted unlawfully”; rather the factual allegations must be sufficient  
 17 to move the claim “across the line from conceivable to plausible.” *Id.* at 1949, 1951 (quoting *Bell*  
 18 *Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Courts dismiss cases that rely on “a formulaic  
 19 recitation of the elements of a cause of action.”

#### 20 **B. The Court Should Dismiss the Claims Because Twilio’s Role is Akin to That of** **a Common Carrier and Should Therefore Be Exempt from Liability.**

21  
 22 This Court should dismiss the TCPA claim against Twilio with prejudice because plaintiff  
 23 does not, and cannot, allege a plausible claim. Similar to the original Complaint, the FAC  
 24 contains no factual allegations that would subject Twilio to liability under the TCPA.<sup>1</sup> As alleged

25 <sup>1</sup> The TCPA imposes liability where an entity uses an “automatic telephone dialing system or an  
 26 artificial or prerecorded voice” to send an unsolicited text message. 47 U.S.C. § 227. Plaintiff  
 27 does not allege facts sufficient to give rise to a plausible inference that an automatic telephone  
 28 dialing system was used. Conclusory assertions (as set forth in FAC at ¶ 55) based “upon  
 information and belief” do not suffice. *Kemp v. Int’l Business Machines Corp.*, No. C-09-4683  
 MHP, 2010 WL 4698490, at \*4 (N.D. Cal. Nov. 8, 2010) (absent supporting factual allegations,  
 conclusory assertions “upon information and belief” do not state a claim).

1 in the FAC, Twilio plays an intermediary role akin to a common carrier by carrying messages  
 2 created by others and routed to recipients identified by others. As discussed below, the FCC has  
 3 consistently exempted “common carriers”<sup>2</sup> from liability, absent specific factual circumstances,  
 4 none of which are alleged here.

5 Common carriers include telephone carriers such as AT&T and Verizon, which are entities  
 6 that enable customers to make telephone calls for a fee. They also include “fax broadcasters,”  
 7 namely individuals or entities that send facsimiles on behalf of others for a fee. Under its  
 8 regulations, the FCC exempts common carriers from liability unless they have a “high degree of  
 9 involvement” or “actual notice” of the illegal use of their services. For example, in 1987, the FCC  
 10 ruled that telephone carriers are immune from liability for illegal use of their services, unless there  
 11 is a “high degree of involvement or actual notice of an illegal use and failure to take steps to  
 12 prevent such transmissions.” *In the Matter of Enforcement of Prohibitions Against the Use of*  
 13 *Common Carriers for the Transmission of Obscene Materials*, 2 FCC Rcd. 2819, 2820 (May 15,  
 14 1987). Skeptical of how a provider of telephone services could in fact ever be liable for illegal  
 15 acts committed through those services, the FCC cited a California district court in stating that it  
 16 would be “unlikely that a telephone common carrier will ever possess sufficient knowledge of an  
 17 illegal use of its facilities to be held liable therefore under section 223(b).” *Id.* at 2820.

18 In 1992, as technology evolved, the FCC extended this common carrier immunity to fax  
 19 broadcasters, again finding that “[i]n the absence of ‘a high degree of involvement or actual notice  
 20 of an illegal use and failure to take steps to prevent such transmissions,’” common “carriers who  
 21 simply provide transmission facilities that are used to transmit others’ unsolicited facsimile  
 22 advertisements may not be held liable.” *In the Matter of Rules and Regulations Implementing the*  
 23 *TCPA of 1991*, 7 FCC Rcd. 8752, 8779-80 (Oct. 16, 1992) (quoting 2 FCC Rcd. 2819, 2820 (May  
 24 15, 1987)). The FCC reaffirmed this finding in 2003, reiterating that “if a common carrier is  
 25 merely providing the network over which a subscriber (a fax broadcaster or other individual,

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26       <sup>2</sup> The FCC defines a “common carrier” as “any person engaged as a common carrier for hire, in  
 27 interstate or foreign communication by wire or radio or interstate or foreign radio transmission  
 28 of energy, except where reference is made to common carriers not subject to this chapter”. 47  
 U.S.C. § 153.

1 business, or entity) sends an unsolicited facsimile message, that common carrier will not be liable  
 2 for the facsimile.” *Rules and Regulations Implementing the TCPA of 1991*, 68 F.R. 44144-01,  
 3 44169 (July 25, 2003). Because the party who actually provides the recipient fax numbers “is in  
 4 the best position to ensure that recipients have consented to receive the faxes,” that party “should  
 5 be liable for violations of the prohibition.” *Id.* at 44169. To clarify any remaining ambiguity, the  
 6 FCC defined a “facsimile broadcaster” to mean “a person or entity that transmits messages to  
 7 telephone facsimile machines on behalf of another person or entity for a fee.” *See* 47 CFR  
 8 64.1200(f)(4). Like telephone common carriers, absent a “high degree of involvement” or “actual  
 9 notice” of any illegal uses, these facsimile broadcasters are immune from liability under the  
 10 TCPA. The FCC specified that the “high degree of involvement” it contemplated existed in  
 11 situations where the fax broadcaster (1) controls the recipient lists; and/or (2) controls the content  
 12 of the advertisements. *See Rules and Regulations Implementing the Telephone Consumer  
 Protection Act (TCPA) of 1991*, 68 FR 44144-01, 44169 (July 25, 2003).

14 As alleged in the FAC, Twilio operates exactly like telephone common carriers and fax  
 15 broadcasters. For a fee, Twilio provides a service whereby a customer can send text messages to a  
 16 specified recipient list. Plaintiff alleges that (1) a GroupMe customer provides the recipient  
 17 telephone numbers to GroupMe, and (2) Twilio merely transmits text messages developed and  
 18 sent by others using the GroupMe service. FAC ¶¶ 12, 17. In other words, plaintiff alleges only  
 19 that Twilio provided the software platform and a telephone number from which these text  
 20 messages could be transmitted. FAC ¶ 18. By this standard, plaintiff cannot state a claim against  
 21 Twilio absent allegations that Twilio had a “high degree of involvement” in the text messages or  
 22 had “actual notice” of the TCPA violations.

23 Plaintiff fails to allege facts sufficient to establish that Twilio had a “high degree of  
 24 involvement” in transmission of these text messages. A “high degree of involvement” necessitates  
 25 pleading that Twilio “controlled” who actually received text messages and/or that Twilio  
 26 “controlled” the content of those text messages. Here again, plaintiff does neither. Plaintiff  
 27 cannot plead around these deficiencies because he affirmatively pleads that GroupMe users  
 28 identify the recipients of text messages (FAC ¶ 12) and GroupMe users and GroupMe control the

1 content of those text messages (FAC ¶¶ 10, 15, 28-29).<sup>3</sup>

2 Plaintiff similarly fails to plead “actual notice” of illegality. Nowhere in the FAC does  
 3 plaintiff plead with any plausibility that Twilio actually knew that its service was being used for  
 4 an illegal purpose. Instead, plaintiff alleges only that “Twilio is able to monitor the nature and  
 5 content of text messages that it transmits to cell phone numbers.” FAC ¶ 22. And based on that  
 6 ability, plaintiff alleges that Twilio “has actual notice of the content of the text message calls that  
 7 it transmits from GroupMe.” FAC ¶ 24. But the “actual notice” that gives rise to liability must be  
 8 “actual notice of an illegal use,” not merely actual notice based on an ability to “monitor” text  
 9 messages. *See In the Matter of Enforcement of Prohibitions Against the Use of Common Carriers*  
 10 *for the Transmission of Obscene Materials*, 2 FCC Rcd. 2819, 2820 (May 15, 1987). Indeed, if  
 11 actual notice could be derived from the mere ability to monitor text messages, it would render  
 12 common carrier and fax broadcaster immunity meaningless, as any plaintiff could allege TCPA  
 13 violations by alleging that a common carrier “is able to monitor” telephone calls made by others,  
 14 or that a fax broadcaster “is able to monitor” faxes sent by others. Like the original Complaint, the  
 15 FAC fails to include any allegations that would give rise to a plausible claim against Twilio. And  
 16 Twilio submits that plaintiff would have no good faith basis to assert such allegations.<sup>4</sup>

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18 <sup>3</sup> Common carrier immunity exists in analogous contexts as well. In *Jurin v. Google Inc.*, 695 F. Supp. 2d 1117 (E.D. Cal. 2010), the court dismissed Lanham Act claims against Google in connection with advertisements on Google. The court found that Google was exempt from liability because Google did not provide the actual content of the allegedly infringing advertisements. *Id.* at 1123. In *Reit v. Yelp!*, 907 N.Y.S.2d 411 (N.Y. Sup. Ct. 2010), the court granted Yelp’s motion to dismiss claims alleging violations of the Federal Communications Decency Act based on reviews posted on Yelp. The court held that Yelp was a mere service provider and could not be liable for content provided by others. *Id.* at 413-14. And in *Chicago Lawyers’ Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666 (7th Cir. 2008), the court affirmed judgment on the pleadings where plaintiff alleged that Craigslist violated Federal Housing Administration anti-discrimination rules. The court held that Craigslist could not be liable because it did not “make []or publish any discriminatory advertisement, text message, or conversation,” and compared Craigslist to courier services that “do not read the documents inside packages.” *Id.* at 668.

25 <sup>4</sup> For example, plaintiff’s allegation that “Twilio maintains lists and/or databases of the recipient’s cell phone numbers that they use to direct GroupMe text messages to those individuals” is alleged based on “information and belief.” FAC ¶¶ 1, 21. This conclusory assertion is not supported by any factual allegations and should thus be ignored as a matter of law. *Kemp*, 2010 WL 4698490, at \*4 (absent supporting factual allegations, conclusory assertions “upon information and belief” do not state a claim). The allegation is otherwise false and Twilio can submit sworn declarations to refute this unsupported allegation. In any event,

1           **C.     The First Amended Complaint Should Be Dismissed with Prejudice.**

2           Where amendment would be futile, the court should deny leave to amend. *Carvalho v.*  
 3     *Equifax Info. Servs., LLC*, 629 F.3d 876, 893 (9th Cir. 2010) (affirming district court denial of  
 4     leave to amend for futility). Courts should consider whether “allegation of other facts consistent  
 5     with the challenged pleading could not possibly cure the deficiency.” *Albrecht v. Lund*, 845 F.2d  
 6     193, 195 (9th Cir. 1988) (citing *Schreiber Distributing Co. v. Serv-Well Furniture Co.*, 806 F.2d  
 7     1393, 1401 (9th Cir. 1986)). Where a plaintiff has previously amended a complaint, a court’s  
 8     discretion to deny leave to amend is “particularly broad.” *Miller v. Yokohama Tire Corp.*, 358  
 9     F.3d 616, 622 (9th Cir. 2004) (citing *Chodos v. W. Publishing Co.*, 292 F.3d 992, 1003 (9th Cir.  
 10    2002)); *see also Johnson v. Buckley*, 356 F.3d 1067, 1077 (9th Cir. 2004) (when considering  
 11    whether to deny leave to amend, courts should consider whether plaintiff has previously amended  
 12    the complaint).

13           The FAC is plaintiff’s second attempt at stating a viable claim against Twilio. Indeed, this  
 14    Court did not even need to rule on Twilio’s original motion to dismiss, because plaintiff chose to  
 15    amend his complaint instead of opposing the motion. Given that the FAC suffers from the same  
 16    pleading deficiencies as the original Complaint, dismissal with prejudice is warranted.

17           In addition, any factual allegations that could cure the deficiencies of the FAC would  
 18    necessarily be inconsistent with the allegations of the FAC:

- 19           • Plaintiff alleges that Twilio was just a “communications platform” for others to  
 20        transmit text messages (FAC ¶ 18); thus, plaintiff cannot amend the FAC to allege  
 21        that Twilio operated as more than a software platform through which others can  
 22        send text messages.
- 23           • Plaintiff alleges that GroupMe users controlled the recipients (FAC ¶ 12); thus,  
 24        plaintiff cannot amend the FAC to allege that Twilio controlled who received text  
 25        messages.
- 26           • Plaintiff alleges that GroupMe users created the content of the text messages (FAC

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27           this allegation does not give rise to a plausible TCPA claim, because plaintiff does not, and  
 28        cannot, make the crucial allegation that Twilio actually controlled who received text messages.

¶ 12, 15); thus, plaintiff cannot amend the FAC to allege that Twilio controlled the content of the text messages.

Nor can plaintiff allege that Twilio had “actual notice” of illegality given plaintiff’s amendment only suggests that Twilio (like any common carrier) theoretically is “able to monitor” the content of text messages (FAC ¶ 22).

At bottom, plaintiff cannot allege that Twilio had a “high degree of involvement or actual notice of illegal use and failure to take steps to prevent such transmissions.” After reviewing Twilio’s arguments in the original motion to dismiss, plaintiff tried to cure these deficiencies, but he did not, and cannot, do so. The Court should therefore conclude that amendment would be futile and dismiss the FAC with prejudice.

**IV. IF THE COURT DECLINES TO DISMISS THE FIRST AMENDED COMPLAINT AGAINST TWILIO, THE COURT SHOULD REFER THE MATTER TO THE FCC UNDER THE DOCTRINE OF PRIMARY JURISDICTION.**

**A. Any Issues Related to Twilio Should Be Referred to the FCC.**

The FAC does not raise any new issues that this Court is appropriately positioned to address. For that reason, if the Court declines to dismiss the FAC against Twilio, any issues related to Twilio would fall squarely within the purview of the FCC and should be addressed by that agency.

Plaintiff alleges Twilio is liable under the TCPA for providing the software platform that enabled GroupMe to send allegedly unsolicited text messages. *See* FAC ¶¶ 17-18. But the TCPA is silent as to whether software application platform providers that merely provide the platform for text messages are liable under the TCPA, or whether they are exempt as a “common carrier.” The FCC is best-positioned to clarify this ambiguity.

Under the doctrine of primary jurisdiction, a court may “determine that the initial decision[-]making responsibility should be performed by the relevant agency rather than the courts.” *Syntek Semiconductor Co. v. Microchip Tech., Inc.*, 307 F.3d 775, 780 (9th Cir. 2002) (referring matter to the Register of Copyrights under the primary jurisdiction doctrine). This is especially appropriate in cases that present important “policy concerns or issues requiring uniform resolution.” *Davel Commc’ns, Inc. v. Qwest Corp.*, 460 F.3d 1075, 1086-89 (9th Cir. 2006). Such

1 a case exists here. The TCPA involves important policy issues related to protecting the rights of  
 2 consumers in connection with tools of communication, *e.g.*, telephone, facsimile, and Internet.  
 3 Congress intended the TCPA to be applied and administered uniformly. *See Rules and*  
 4 *Regulations Implementing the TCPA of 1991*, 68 F.R. 44144-01, 44155 (July 25, 2003); *see also*  
 5 *Report and Order, In the Matter of Rules and Regulations Implementing the Telephone Consumer*  
 6 *Protection Act (TCPA) of 1991*, Docket No. 02-278, FCC 03-153, ¶ 83 (June 26, 2003) (“we  
 7 believe that it was the clear intent of Congress generally to promote a uniform regulatory scheme  
 8 under which telemarketer would not be subject to multiple, conflicting regulations.”) (citing 137  
 9 Cong. Rec. S18317-01, at 1 (1991) (remarks of Sen. Pressler) (discussing the TCPA and stating  
 10 that “[t]he Federal Government needs to act now on uniform legislation to protect consumers.”)).

11 To determine whether it is appropriate to apply the doctrine of primary jurisdiction, courts  
 12 traditionally evaluate four factors: “(1) whether the question at issue is one within the  
 13 conventional experience of judges or whether it involves technical or policy considerations within  
 14 the agency’s particular field of expertise; (2) whether the question at issue is particularly within  
 15 the agency’s discretion; (3) whether there exists a substantial danger of inconsistent ruling; and (4)  
 16 whether a prior application to the agency has been made.” *See United States v. Dish Network,*  
 17 *L.L.C.*, No. 09-3073, 2011 WL 475067, at \*2 (C.D. Ill. Feb. 4, 2011) (citing *Davel Commc’ns*, 460  
 18 F.3d at 1086-87). Applied to the present case, the Court should conclude that the issue presented  
 19 in the FAC should be referred to the FCC for resolution. First, the TCPA is an issue within the  
 20 FCC’s particular field of expertise, with Congress specifically tasking the FCC to issue rulings to  
 21 implement the TCPA. 47 U.S.C. § 227(b)(2) (requiring the FCC to “prescribe regulations to  
 22 implement” the TCPA); *see also* 47 U.S.C. § 151 (establishing FCC and charging it with task of  
 23 regulating interstate communications).

24 Second, plaintiff seeks to impose TCPA liability on a software application platform  
 25 provider that merely provides transmission facilities used by others to transmit text messages.  
 26 Whether such an entity enjoys TCPA immunity as a “common carrier” is an issue particularly  
 27  
 28

1 suited for resolution by the FCC.<sup>5</sup>

2 Third, telephone calls, facsimiles, and the Internet span the entire nation, indeed the entire  
 3 globe, making the TCPA an issue of national reach and scope. Were this Court to issue a ruling  
 4 on the matter, there would be a high risk of conflicting results should the FCC issue a rulemaking.

5 Lastly, the FCC has already received a petition from a text message carrier company  
 6 seeking a declaratory ruling that it is a common carrier and thus not liable under the TCPA, a  
 7 petition which the FCC has taken under submission.<sup>6</sup> This petition remains pending and is ripe for  
 8 FCC rulemaking. The FCC previously considered similar issues regarding facsimile common  
 9 carriers and found them to be exempt from liability under the TCPA, provided the carrier had no  
 10 content control or actual knowledge of illegal activity. *See In the Matter of Rules and Regulations*  
 11 *Implementing the Telephone Consumer Protection Act of 1991*, 7 FCC Rcd. 8752, 8779-80, ¶ 54  
 12 (Oct. 16, 1992) (quoting 2 FCC Rcd. 2819, 2820 (May 15, 1987)) (“In the absence of ‘a high  
 13 degree of involvement or actual notice of an illegal use and failure to take steps to prevent such  
 14 transmissions,’” common “carriers who simply provide transmission facilities that are used to  
 15 transmit others’ unsolicited facsimile advertisements may not be held liable [under the TCPA]”).  
 16 Applying the FCC’s ruling, courts have exempted facsimile common carriers from TCPA liability.  
 17 *Kopff v. Battaglia*, 425 F. Supp. 2d 76, 92 (D.D.C. 2006) (stating that fax broadcasters who  
 18 operate like common carriers are not liable under the TCPA in the absence of involvement in the  
 19 content or actual notice of illegal activity).

20 Because the FCC has not explicitly ruled upon the question of whether text message  
 21 platform providers are analogous to facsimile common carriers and should be similarly exempt  
 22 from liability under the TCPA, this case is appropriate for transfer to the FCC under the doctrine  
 23

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24 <sup>5</sup> In fact, Plaintiff’s entire case arises out of the FCC carrying out its duty to define the scope of  
 25 the TCPA. In 2003, the FCC ruled that the TCPA’s definition of “call” would include “both  
 26 voice calls and text calls.” *See Rules and Regulations Implementing the TCPA of 1991*, 68 F.R.  
 27 44144-01, 44165 (July 25, 2003); *see also Rules and Regulations Implementing the Telephone  
 Consumer Protection Act of 1991*, 19 FCC Rcd. 15927, 15933 (Aug. 12, 2004). Deferring to  
 thereafter applied the FCC rulemaking to find that the TCPA covers text messages. 569 F.3d  
 946, 952 (9th Cir. 2009).

28 <sup>6</sup> The petition, filed by Club Texting, Inc., is discussed in detail in the next section, Sec. IV.B.

1 of primary jurisdiction. *See Syntek Semiconductor Co.*, 307 F.3d at 782 (holding that application  
 2 of the primary jurisdiction doctrine is appropriate where the “case requires the resolution of an  
 3 issue within the jurisdiction of an administrative body exercising statutory and comprehensive  
 4 regulatory authority over a national activity that requires expertise and uniformity in  
 5 administration.”).

6       **B. The FCC is Considering a Petition Regarding the Precise Issues in this Case.**

7           The exact issue presented in this case—whether a text message service provider is a  
 8 common carrier and exempt from liability under the TCPA—is already under submission before  
 9 the FCC. On August 25, 2009, Club Texting, Inc. (“Club Texting”) filed a petition to the FCC  
 10 seeking a declaratory ruling “that, consistent with the treatment of fax broadcasters, text  
 11 broadcasters are not ‘senders’ of text messages under [the TCPA].” *See Petition for Declaratory*  
 12 *Ruling Before the Federal Communications Commission, Club Texting, Inc. Petition for*  
 13 *Declaratory Ruling that Text Broadcasters are not “Senders” of Text Messages Under § 227(b)(1)*  
 14 *of the Telephone Consumer Protection Act*, Docket No. 02-278, at 1 (Aug. 25, 2009). Request for  
 15 Judicial Notice (“RJN”), Ex. 1. Club Texting defined a “text broadcaster” as a person or entity  
 16 that transmits SMS text messages to mobile telephones on behalf of another person or entity for a  
 17 fee. *Id.* at 1 n.1. Club Texting reasoned that “[t]ext broadcasters act neither as the sender or  
 18 recipient of text messages, but rather as an intermediary and conduit operating a platform that  
 19 enables message delivery,” and “[i]n light of the functional equivalence between text broadcasting  
 20 and fax broadcasting, the [Federal Communications] Commission should clarify that text  
 21 broadcasters, like fax broadcasters, are not ‘senders’ of text messages under the TCPA.” *Id.* at 1.

22           In response, the FCC issued a public notice seeking public comments. *See Public Notice,*  
 23 *Consumer & Governmental Affairs Bureau Seeks Comment on Club Texting’s Petition for*  
 24 *Declaratory Ruling Concerning the Telephone Consumer Protection Act (TCPA) Rules*, Docket  
 25 No. 02-278 (Nov. 9, 2009). RJN, Ex. 2. The petition is currently under submission and the FCC  
 26 has not yet issued a ruling.

27           The Club Texting petition squarely addresses whether Twilio may be liable under the  
 28 TCPA. In such situations, where an agency’s pending decision applies to the specific issue

1 presented in the litigation, primary jurisdiction is especially applicable. *See Hart v. Comcast of*  
 2 *Alameda*, No. C 07-6350 PJH, 2008 WL 2610787, at \*2 (N.D. Cal. June 25, 2008) (holding the  
 3 FCC had primary jurisdiction because two petitions had been filed on the precise issue before the  
 4 court, and the FCC has announced it would seek public comment); *Clark v. Time Warner Cable*,  
 5 523 F.3d 1110, 1113-14 (9th Cir. 2008) (holding that the FCC had primary jurisdiction over the  
 6 plaintiff's claim because the Notice of Proposed Rulemaking sought comment on the precise issue  
 7 addressed before the court); *see also Davel Commc'ns*, 460 F.3d at 1090 ("It is precisely the  
 8 purpose of the primary jurisdiction doctrine to avoid the possibility of conflicting rulings by courts  
 9 and agencies concerning issues within the agency's special competence.").

10 Thus, if the Court does not dismiss the claims against Twilio pursuant to Rule 12(b)(6), the  
 11 Court should exercise its discretion under the primary jurisdiction doctrine and refer the matter to  
 12 the FCC because the issue presented in this action satisfies the four factors enumerated in *Davel*  
 13 *Communications*, and because the precise issue at hand is already being considered by the FCC.

14 **V. CONCLUSION.**

15 For the foregoing reasons, this Court should dismiss all claims against Twilio with  
 16 prejudice.

17 Dated: September 29, 2011

Respectfully submitted,

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 30 *Attorneys for Defendants*  
 31 *Twilio, Inc., a Delaware Corporation*

1                   **PROOF OF SERVICE**

2                   I, Katharine J. Westfall, declare:

3                   I am employed in the County of San Francisco, State of California. I am over the age of 18  
 4 and not a party to the within action. My business address is 901 New York Avenue, NW,  
 5 Washington, DC 20001.

6                   On September 29, 2011, I served the following documents by placing a true copy thereof  
 7 in a sealed envelope(s) on the persons below as follows:

8                   **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION BY  
 9 TWILIO, INC. TO DISMISS FIRST AMENDED CLASS ACTION COMPLAINT**

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24                   (MAIL) I placed the envelope for collection and mailing, following our ordinary  
 25 business practices. I am readily familiar with this firm's practice for collecting and  
 processing correspondence for mailing. On the same day that correspondence is placed  
 26 for collection and mailing, it is deposited in the ordinary course of business with the  
 United States Postal Service, in a sealed envelope with postage fully prepaid. I am a  
 27 resident or employed in the county where the mailing occurred. The envelope or  
 package was placed in the mail at San Francisco, California.

28

- 1     (CM/ECF Electronic Filing) I caused the above document(s) to be transmitted to the  
 2    office(s) of the addressee(s) listed above by electronic mail at the e-mail address(es) set  
 3    forth above pursuant to Fed.R.Civ.P.5(d)(1). "A Notice of Electronic Filing (NEF) is  
 4    generated automatically by the ECF system upon completion of an electronic filing. The  
 5    NEF, when e-mailed to the e-mail address of record in the case, shall constitute the proof  
 6    of service as required by Fed.R.Civ.P.5(d)(1). A copy of the NEF shall be attached to  
 7    any document served in the traditional manner upon any party appearing pro se."
- 8     (EXPRESS MAIL) I placed the envelope for collection and mailing, following our  
 9    ordinary business practices. I am readily familiar with this firm's practice for collecting  
 10    and processing Express Mail for mailing. On the same day that Express Mail is placed  
 11    for collection and mailing, it is deposited in the ordinary course of business with the  
 12    United States Postal Service, in a post office, mailbox, sub-post office, substation, mail  
 13    chute, or other like facility regularly maintained by the United States Postal Service for  
 14    receipt of Express Mail.
- 15     (OVERNIGHT DELIVERY) I deposited in a box or other facility regularly maintained  
 16    by Federal Express , an express service carrier, or delivered to a courier or driver  
 17    authorized by said express service carrier to receive documents, a true copy of the  
 18    foregoing document in sealed envelopes or packages designated by the express service  
 19    carrier, addressed as stated above, with fees for overnight delivery paid or provided for.
- 20     (MESSENGER SERVICE) I served the documents by placing them in an envelope or  
 21    package addressed to the persons at the addresses listed and provided them to a  
 22    professional messenger service for service. A separate Personal Proof of Service  
 23    provided by the professional messenger service will be filed under separate cover.
- 24     (FACSIMILE) Based on an agreement of the parties to accept service by fax  
 25    transmission, I faxed the documents to the persons at the fax numbers listed. No error  
 26    was reported by the fax machine that I used. A copy of the record of the fax  
 27    transmission, which I printed out, is attached.
- 28     (E-MAIL or ELECTRONIC TRANSMISSION) Based on a court order or an agreement  
 29    of the parties to accept service by e-mail or electronic transmission, I caused the  
 30    documents to be sent to the persons at the e-mail addresses listed. I did not receive,  
 31    within a reasonable time after the transmission, any electronic message or other  
 32    indication that the transmission was unsuccessful.

I declare under penalty of perjury that I am employed in the office of a member of the bar  
 of this Court at whose direction this service was made and that the foregoing is true and correct.

Executed on September 29, 2011, at Washington, District of Columbia.

Katharine J. Westfall  
 (Type or print name)



(Signature)